IN THE

UPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1971

Nos. 71-788, 71-834, 71-1031

... TRIBE, *Petitioner,*

v.

..., COMMISSIONER OF THE BUREAU ... OF THE STATE OF NEW MEXICO, and ... OF REVENUE OF THE STATE OF ..., *Respondents.*

... McCLANAHAN, on behalf of herself ... similarly situated, *Appellant,*

v.

... TAX COMMISSION, *Appellee.*

..., *Appellant,*

v.

... OF WASHINGTON, *et al.*, *Appellees.*

...TIORARI TO THE COURT OF APPEALS ...W MEXICO, AND ON APPEAL FROM ...REME COURT OF ARIZONA AND ...REME COURT OF WASHINGTON

... AMICUS CURIAE MULTISTATE TAX COMMISSION

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IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1971

Nos. 71-738, 71-834, 71-1031

MESCALERO APACHE TRIBE,	*Petitioner,*
v.	
FRANKLIN JONES, COMMISSIONER OF THE BUREAU OF REVENUE OF THE STATE OF NEW MEXICO, and THE BUREAU OF REVENUE OF THE STATE OF NEW MEXICO,	*Respondents.*
ROSALIND MCCLANAHAN, on behalf of herself and all others similarly situated,	*Appellant,*
v.	
ARIZONA STATE TAX COMMISSION,	*Appellee.*
LEONARD TONASKET,	*Appellant,*
v.	
THE STATE OF WASHINGTON, *et al.*,	*Appellees.*

ON CERTIORARI TO THE COURT OF APPEALS OF NEW MEXICO, AND ON APPEAL FROM SUPREME COURT OF ARIZONA AND SUPREME COURT OF WASHINGTON

BRIEF OF AMICUS CURIAE MULTISTATE TAX COMMISSION

STATEMENT OF INTEREST

This brief is submitted, with the written consent of the parties, to permit the Multistate Tax Commission to supplement the arguments of the appellees in each of these causes.

The Multistate Tax Commission is the official administrative agency of the Multistate Tax Compact entered into by twenty-one states as full members, and by fifteen states as associate members.[1]

It is significant to the Multistate Tax Commission that the applicability of various state excises as pertains to Indians and the Indian tribal organizations both on and off the reservations and in reference to sales to both Indians and non-Indians be clarified by this court. In *Mescalero*, there is a question posed concerning the the excise tax status of business operations off the reservation, apparently conducted by an organized Indian tribe through a corporation organized by the tribe. *McClanahan* involves the application of an income tax to an Indian in her individual capacity as a resident of the state of Arizona residing on the Navajo reservation where she earns the income. *Tonasket* is concerned with cigarette sales primarily to non-Indians by an individual Indian on his allotted land on the Colville tribe reservation, jurisdiction over which has been conceded to the state of Washington.

Each of these cases poses serious tax problems for many of the Multistate Tax Commission members. Stretched to their ultimate conclusions, argu-

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[1] The legislatures of 21 states have enacted the Multistate Tax Compact, thereby making those states regular members of the Commission. Those states are: Kansas, Washington, Texas, New Mexico, Illinois, Florida, Nevada, Oregon, Missouri, Nebraska, Arizona, Idaho, Hawaii, Colorado, Wyoming, Utah, Montana, North Dakota, Michigan, Alaska and Indiana. One state, Alabama, has enacted its Compact subject to Congressional legislative consent. Pending enactment of such consent, Alabama is considered to be an associate member state. Fourteen other states are associate members at the request of the respective governors. Those states are: Arizona, California, Georgia, Louisiana, Maryland, Massachusetts, Minnesota, New Jersey, Ohio, Pennsylvania, South Dakota, Tennessee, Virginia and West Virginia.

...in these three cases against state tax jurisdic... ...would free from any state excise taxes the busi... ...and other income-producing activities of all Indians, whether carried on within the confines of an Indian reservation or outside the Indian reservation, and whether carried on by an individual Indian or by a tribe or by an independent corporation created by the tribe.

STATEMENT OF FACTS

The significant facts in each of these cases have been set forth in other briefs, and need not be repeated here in any detail. In bare outline, they are as follows:

1. Tonasket.

Tonasket, a full blood member of the Colville tribe, conducts a retail business (primarily for the sale of cigarettes) which he owns on his allotted lands on the Colville Indian reservation. He purchases name brand cigarettes from out-of-state distributors and then sells them primarily to non-Indians free of any state tax. The federal cigarette tax is paid on all cigarettes which he sells. It is clear that profits from Tonasket's business are subject to the federal income tax. The Colville tribe has given its consent to the state of Washington to assume criminal and civil jurisdiction, which Washington has done pursuant to Public Law 83-280, 67 Stat. 588, 28 U.S.C.A. § 1360 (1964), and chapter 37.12 Revised Code of Washington (RCW).

2. McClanahan.

McClanahan is a full blood member of the Nav-

ajo tribe; resides on the Navajo reservation in Arizona; and earns wages from employment on the reservation. It is clear that her income in question is subject to the federal income tax.

3. Mescalero

The Mescalero Apache tribe has constructed and operates ski resort facilities on properties off the reservation leased by a tribal corporation from the United States Forest Service. The development of the facilities was made possible by loans from the United States under authority of 25 U.S.C. 470, but the facilities were built by and are operated by the tribal corporation subject to federal approval as to plans for initial facilities, construction of improvements and arrangements for sub-leasing, budgeting and accounting.

SUMMARY OF ARGUMENT

There is no question, as pertains to these three cases (*Mescalero*, *McClanahan* and *Tonasket*), that the location of the respective taxable activities is within the territorial limits of the respective states which are asserting jurisdiction. No treaties, statehood enabling legislation or federal statutes remove these locations from the territorial limits of the respective states. *Surplus Trading Co. v. Cook*, 281 U.S. 647, 74 L ed 1091 (1930); *State of New York ex rel. Ray v. Martin*, 326 U.S. 496, 90 L ed 261 (1946); *United States v. McGowan*, 302 U.S. 535, 82 L ed 410 (1938); *United States v. McBratney*, 104 U.S. 621, 26 L ed 869 (1882); *Draper v. United States*, 164 U.S. 240, 41 L ed 419 (1896); *Thomas*

[illegible], 169 U.S. 264, 42 L ed 740 (1898); *Wagoner v. Evans*, 170 U.S. 588, 42 L ed 1154 (1898); *Montana Catholic Missions v. Missoula County*, 200 U.S. 118, 50 L ed 398 (1906); *Williams v. Lee*, 358 U.S. 217, 3 L ed 2d 251 (1959); *Organized Village of Kake v. Egan*, 369 U.S. 60, 7 L ed 2d 573 (1962). It is clear then that jurisdiction exists in a general sense. The question is whether or not it exists in terms of the specific manner in which it is exercised in these tax cases.

The question is answered by an analysis of the legal principles which apply to these respective matters. None of these principles would preclude the exercise of jurisdiction. The states of Washington, New Mexico and Arizona are not taxing any property or interests in property. The taxes in issue are general excise taxes imposed on income or receipts derived from employment or business operations.

In the *Tonasket* case, there is an affirmative assumption of criminal and civil jurisdiction by the state of Washington and a relinquishment of jurisdiction by the Colville tribe pursuant to applicable federal (PL 83-280, 67 Stat. 588, 28 U.S.C.A. § 1360 (1964), *supra*),* state (chapter 37.12 RCW, *supra*), and tribal law (Colville Business Council Resolution 1965-4). Any claimed tax immunity in the *Tonasket* case must first be predicated on the argument that the controlling federal statute does not mean what it says. Assuming, *arguendo*, that the federal statute (PL 280) does not mean what it says, Tonasket must establish either (1) that he is

* Hereinafter referred to as PL 280.

a federal instrumentality and thus impliedly immune from state excise taxes in his private profit proprietary endeavors, or (2) that the United States has preempted the field. Since there is no reason to suppose that the doctrine of implied governmental immunity is broader as pertains to Indians in their individual capacity than to anyone else, it is clear that this doctrine does not grant Tonasket any exemption. Furthermore, there has been no preemption because Tonasket is not in any way regulated by the federal government in regard to the sales in which the state of Washington is interested, namely, his sales to non-Indians (Washington exempts from its cigarette tax laws sales by Indians to Indians).

In *McClanahan*, the only restriction applicable is that of implied governmental immunity. It is no more applicable to *McClanahan* than to *Tonasket*.

In *Mescalero*, the issues are again those pertaining to preemption by the Congress and to implied governmental immunity. There is no preemption because the Indian Trader Act applies only to traders on the reservation. Furthermore, no exemption from state taxation can be inferred from the fact that the federal government loaned money to finance and took the normal lender precautions of overseeing the utilization of that money within the terms of the loan. Nor may immunity be inferred from the fact that the ski resort is located on federal forest lands leased to the tribe. Finally, in conducting a *proprietary enterprise*, the tribe is not impliedly immune from state excise taxes under the doctrine of implied governmental immunity.

Apart from any consideration of express federal legislation (Pl. 280), *Mescalero*, *McClanahan* and *Squire* are controlled by the tax decisions of this court upholding taxation of Indians in the Oklahoma estate tax cases of *Oklahoma Tax Com. v. United States*, 319 U.S. 598, 87 L ed 1612 (1943), and *West v. Oklahoma Tax Commission*, 334 U.S. 717, 92 L ed 1676 (1948); the United States income tax cases of *Five Civilized Tribes v. Com'r of Int. Rev.*, 295 U.S. 418, 79 L ed 1517 (1935), *Choteau v. Burnet*, 283 U.S. 691, 75 L ed 1353 (1931); *Com'r of Int. Rev. v. Walker*, 326 F 2d 261 (CCA 9th, 1964); and *Helvering v. Mountain Producers Corp.*, 303 U.S. 376, 82 L ed 907 (1938); and the state income tax case of *Lusky v. State Treasurer of Oklahoma*, 297 U.S. 420, 80 L ed 771 (1936); and property and excise tax cases such as *McCurdy v. United States*, 246 U.S. 263, 62 L ed 706 (1918), *Shaw v. Gibson-Zahniser Oil Corp.*, 276 U.S. 575, 72 L ed 709 (1928), and *Agua Caliente Band of Mission Indians v. County of Riverside*, 442 F 2d 1184 (CCA 9th, 1971), cert. den. U.S. Supreme Court February 22, 1972.

Arguments for appellants' position in these cases proceed upon the erroneous assumption, contrary to the *Kake* case, *supra*, and to decisions referred to both herein and in *Kake*, that the states possess no tax jurisdiction over Indians except as specifically authorized by Congress. Since there is no expressed or implied prohibition to the tax impositions here questioned, appellants' arguments are clearly fallacious.

The *Kake* case, *supra*, and *Williams v. Lee*, *supra*, establish the principle that the states have a residual jurisdiction over Indian affairs subject to two conditions: (1) That Congress has not preempted the field, and (2) that the exercise of state jurisdiction does not interfere with the Indians' right of self-government.

Where there is no conflict between federal and state authority, and when the state action is in an area left void *in fact* by Indian local self-government, both logic and necessity dictate that state law should fill the gap.

ARGUMENT

1. An Indian Reservation is Within the Territorial Jurisdiction of The State in Which it is Located.

Premised on the early cases of *Worcester v. Georgia* (U.S.), 6 Pet. 515, 8 L ed 483; *Kansas Indians* (*Blue Jacket v. Johnson County*) (U.S.), 5 Wall 737, 18 L ed 667 (1866); and *New York Indians* (*Fellows v. Denniston*) (U.S.), 5 Wall 761, 18 L ed 708 (1866), the argument is made on behalf of the appellants in these causes that the states have no jurisdiction over Indian reservations except as expresaly authorized by Congress. This argument is best expressed in terms of geography; an Indian reservation is "off limits" to state jurisdiction. However, under later cases such as *Kake v. Egan*, *supra*, 369 U.S. 60, 70 L ed 2d 573 (1962); *Surplus Trading Co. v. Cook*, *supra*, 281 U.S. 647, 74 L ed 1091 (1930); *New York ex rel. Ray v. Martin*, *supra*, 326 U.S. 496, 90 L ed 261 (1946); *United States v.*

McGowan, *supra*, 302 U.S. 535, 82 L ed 410 (1938); and *Williams v. Lee*, *supra*, 358 U.S. 217, 3 L ed 2d 251 (1959), any such territorial approach to the problem of state taxing jurisdiction is unwarranted, and obscures the true nature of the problems in the instant cases.

Surplus Trading Co. v. Cook, *supra*, described the conditions under which the states may exercise jurisdiction over Indian reservations, as follows:

> "It is not unusual for the United States to own within a state lands which are set apart and used for public purposes. Such ownership and use without more do not withdraw the lands from the jurisdiction of the state. On the contrary, the lands remain part of her territory and within the operation of her laws save that the latter cannot affect the title of the United States or embarrass it in using the lands or interfere with its right of disposal.
>
> "A typical illustration is found in the usual Indian reservation set apart within a state as a place where the United States may care for its Indian wards and lead them into habits and ways of civilized life. Such reservations are part of the state within which they lie and her laws, civil and criminal, have the same force therein as elsewhere within her limits, save that they can have only restricted application to the Indian wards. * * *" (281 U.S. at 650-651.)

An even more unqualified statement was made in *State of New York ex rel. Ray v. Martin*, *supra*:

> "* * * in the absence of a limiting treaty obligation or Congressional enactment each state had a right to exercise jurisdiction over Indian reservations within its boundaries. * * *" (326 U.S. at 499, quoted with approval in *Kake v. Egan*, 369 U.S. at 74.)

In *United States v. McGowan, supra*, this court held, with reference to the Reno Indian colony in Nevada, which was purchased by the United States for use of Indians:

> "The Federal prohibition against taking intoxicants into this Indian colony does not deprive the State of Nevada of its sovereignty over the area in question. The Federal Government does not assert exclusive jurisdiction within the colony. Enactments of the Federal Government passed to protect and guard its Indian wards only affect the operation, within the colony, of such state laws as conflict with the Federal enactments." (302 U.S. at 539.)

As more recently stated by this court in *Kake v. Egan, supra*:

> "The general notion drawn from Chief Justice Marshall's opinion in Worcester v Georgia (US) 6 Pet 515, 561, 8 L ed 483, 501; Kansas Indians (Blue Jacket v Johnson County) (US) 5 Wall 737, 755-757, 18 L ed 667, 672, 673; * * * that an Indian reservation is a distinct nation within whose boundaries state law cannot penetrate, has yielded to closer analysis when confronted, in the course of subsequent developments, with diverse concrete situations. *By 1880 the Court no longer viewed reservations as distinct nations. On the contrary, it was said that a reservation was in many cases a part of the surrounding State or Territory, and subject to its jurisdiction except as forbidden by federal law.* [Citation omitted.] In Langford v Monteith, 102 US 145, 26 L ed 53, the Court held that process might be served within a reservation for a suit in territorial court between two non-Indians. In United States v McBratney, 104 US 621, 26 L ed 869, and Draper v United States, 164 US 240, 41 L ed 419, 17 S Ct 107, the Court held that murder of one non-Indian by another on a reservation was a matter for state law." (369 U.S. at 72-73.) (Emphasis added.)

In *Williams v. Lee*, *supra*, this court, in commenting on the principles enunciated in *Worcester v. Georgia*, *supra*, stated as follows:

"* * * Over the years this Court has modified these principles in cases where essential tribal relations were not involved and where the rights of Indians would not be jeopardized, but the basic policy of Worcester has remained. * * * Essentially, absent governing Acts of Congress, *the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them.* * * *" (358 U.S. at 219-220) (Emphasis added.)

These cases point out the proper direction and form for our inquiry. First, it is to determine whether the effect of the state taxes here in question conflicts with enunciated federal legislation and policies concerning Indian affairs.[*] As will be demonstrated, the taxes in question are not forbidden by any act of Congress or by treaty provisions, and do not directly impinge upon any federal policy. Secondly, our inquiry must determine whether the taxes involved in these causes conflict with tribal self-government. As will also be demonstrated, there is no such conflict.

2. **Imposition of the Taxes in the Instant Causes Is Not in Conflict With any Federal Statutes or Regulations Concerning the Individual Indians and the Indian Tribes in Question.**

The appellants and the amici curiae for the ap-

[*] The appellants' argument that the states have no jurisdiction over Indians or their lands unless specifically granted by Congress is refuted by their preemption argument. Preemption has application and meaning only where both the federal government and the states have concurrent jurisdiction over the subject matter. The subject matter is preempted by Congress only when Congress exercises jurisdiction in such a manner that any state legislation over the same subject matter would be conflicting.

pellants have not pointed to and do not rely upon any express federal statutes or regulations which expressly prohibit the imposition of the state taxes in question. However, a common argument of the appellants and amici curiae for appellants pertaining to conflicting federal legislation stems from the notion that the taxes in question are taxes somehow imposed upon restricted or trust lands or funds of the Indians and Indian tribal organization in question, such lands themselves being exempt from taxation by reason of express treaty provisions. Such an argument misconceives the legal incidence and nature of the taxes with which we are here concerned. *McClanahan* involves a general income tax on earnings. It has long been settled that an income tax is not a tax on property or an interest in property. An income tax, by its very nature, is an excise tax imposed upon an abstract concept of taxable income. As stated in *Graves v. New York*, 306 U.S. 466, 83 L ed 927 (1939):

> "* * * The theory, which once won a qualified approval, that a tax on income is legally or economically a tax on its source, is no longer tenable, [cases cited] * * *" (306 U.S. at 480)

The same is true in regard to the New Mexico gross receipts tax and compensating (use) taxes involved in *Mescalero* and the Washington cigarette tax involved in *Tonasket*. A tax upon the use or sale of property is not a tax on the property. *Sullivan v. United States*, 395 U.S. 169, 23 L ed 2d 182 (1969); *United States v. Detroit*, 355 U.S. 466, 2 L ed 2d 424

(1953). Indeed, if these taxes were considered property taxes, they would undoubtedly be invalid by reason of *state law*, as their imposition would violate state constitutional property tax uniformity requirements.[1]

The congressional policy of exempting from state and federal taxes trust or restricted property of Indians or Indian tribal organizations is not applicable to these causes. This type of property was the subject of taxation involved in *Squire v. Capoeman*, 351 U.S. 1, 100 L ed 883 (1956). That case properly held that the federal income tax could not be applied to the proceeds of timber taken from the land since it was in substance a tax on the land. In contrast, the taxes in the instant causes are personal income or general business excise taxes. Their incidence does not fall on any property or interest in property.

A second common argument, related to the first, is that since the taxes in question under state law can create liens for collection against tax exempt property of the Indians, the taxes themselves are invalid. However, the validity of the imposition of a tax does not turn on whether or not all of the assets or property of the taxpayer are available for enforcement of the tax by lien, attachment, execution, or otherwise. This court can take judicial notice of the

[1] This conclusion follows because the imposition of an additional tax on some property and not on other property violates the common uniformity requirements of equality of rate of taxation. For example, if a use tax were a tax on property, its imposition on property acquired during the tax year would impose an additional tax and thus higher rate on this property compared to all other property for the year in which it was acquired. Cooley on Taxation, Vol. 1 (4th ed.), [illegible]

fact that not all property of every citizen is available to meet validly imposed tax obligations. This alone does not invalidate a tax.

In *United States v. Alabama*, 313 U.S. 247, 85 L ed 1327 (1941), this court recognized the validity of a state tax and the lien arising thereunder, even though the lien could not be enforced against the United States without its consent because of federal ownership of the property subject to the lien.

The precise question of collection of a state tax from Indian restricted or trust property was faced by the court in *West v. Oklahoma Tax Commission*, supra, 334 U.S. 717, 92 L ed 1676 (1948). This court there noted:

> "• • • It is therefore possible that if the tax were unpaid Oklahoma might try to place a lien upon the property which is being transferred, property as to which the United States holds legal title. Complications might arise as to the validity of such a lien. And the United States would be burdened to the extent of opposing the imposition of the lien or seeing that the tax was paid so as to avoid the lien." (334 U.S. at 725)
>
> "The result of permitting the imposition of the inheritance tax on the transfer of trust properties may be, as we have noted, to deplete the trust corpus and to create lien difficulties. But those are normal and intended consequences of the inheritance tax. And until Congress has in some affirmative way indicated that these burdens require that the transfer be immune from the inheritance tax liability, the Oklahoma Tax Commission Case permits that liability to be imposed. • • •" (334 US at 727)

Thirdly, the appellants suggest that federal legislation generally establishing a protective policy

toward the Indians and their lands supports the tax exemption here claimed. This protective policy which placed the Indian in a ward or dependent status was not only implemented by restrictions on the Indian's ability to dispose of his land, but was also implemented by the Indian Trader Act (25 USC §§ 261-264)* and specific policies and programs of the government for the economic rehabilitation of the Indians.

However, the fact that in these particulars Congress has sought to treat the Indian as a ward or dependent of the United States does not create any general immunity from state taxation.

As noted by this court in *Oklahoma Tax Com. v. United States, supra*:

> "It is true that our interpretation of the 1938 statute must be in accord with the generous and protective spirit which the United States properly feels toward its Indian wards, but we cannot assume that Congress will choose to aid the Indians by permanently granting them immunity from taxes which they are as able as other citizens to pay. It runs counter to any traditional concept of the guardian and ward relationship to suppose that a ward should be exempted from taxation by the nature of his status, and the fact that the federal government is the guardian of its Indian ward is no reason, by itself, why a state should be precluded from taxing the estate of the Indian. We have held that the Indians, like all other citizens, must pay federal income taxes. Superintendent of Five Civilized Tribes v. Commissioner of Internal Revenue, supra (295 US 421, 79 L ed 1520, 55

*As shown in the brief of appellees in Tyonakee, the Indian Trader Act has no application in any of these cases, for the reason that the [illegible] land in these causes are in no way regulated by the Indian Trader Act.

S Ct 320). 'Wardship with limited power over his property' did not there 'without more render [the Indian] immune from the common burden.' * * *"

The correctness of this court's refusal to consider the wardship or dependency status of the Indian as a basis for tax exemption is reinforced by the limited nature of the overall protective policy mentioned above.

Coupled with this protective policy was the policy of removing the Indian and his land from any dependent or wardship relation with the United States, while preserving tribal customs and laws. Such, for example, was the purpose of the Indian Reorganization Act of 1934 (48 Stat. 984 (1934), 25 U.S.C. 461 *et seq.*). The following sections of the United States Code are provisions of this act and embody those dual policies.

25 U.S.C. § 465 authorizes acquisition of lands for Indians which are tax-exempt and held in trust. Up to $2 million may be appropriated for this purpose. In congressional debate on this section, the purpose was stated to be consolidation of badly checker-boarded reservations and supplementation of Indian stock grazing and forest lands, 78 Cong. Rec. 11730.

25 U.S.C. § 470 establishes a $20 million revolving fund and authorizes loans to Indian chartered corporations for the purpose of promoting economic development of tribes and members. Congress intended this provision to be broad enough to permit loans to corporations or individual members, 78 Cong. Rec. 11730.

An Indian chartered corporation for profit does not have the same status as an Indian tribe under the Indian Reorganization Act of 1934. The latter is organized for *governmental purposes* under 25 U.S.C. § 476. The former is organized under 25 U.S.C. § 477 and requires petition by one-third of the adult Indians and ratification by a majority of them of a corporate charter. Such charter may convey to the incorporated tribe power to manage real and personal property and "such further powers as may be incidental to the conduct of corporate business, *not inconsistent with the law*," 25 U.S.C. § 477. (Emphasis added.)

The intent of congress in separating its appropriations for land acquisition and loans, as well as its provisions for tribal and corporate organization, is clear. Tribal organization and the consolidation of reservations further the federal policy of preserving Indian customs and management of their *own* affairs. Corporate organization and the loan fund further the federal policy of integrating the Indians into the American economic life. As the sponsor of the Indian Reorganization Act stated:

> "* * * the program of self-support and of business and civic experience in management of their own affairs * * * will permit increasing numbers of Indians to enter the white world on a footing of *equal* competition." (78 Cong. Rec. 11732) (Emphasis added.)

This goal of economic integration is being attained; as instances of this, we need only look to the [illegible] selling activities of Mr. Tonasket, and the [illegible] enterprise of the Mescalero Apache Tribe.

Their activities are in direct competition with similar non-Indian business enterprises, and their financial success depends upon essentially non-Indian market or clientele.

Neither property tax exemptions on trust or restricted land, nor possible collection problems, nor wardship status should exempt these activities from the common tax burden, or provide the basis for implying a congressional intent that there be such an exemption.

> "This Court has repeatedly said that tax exemptions are not granted by implication. * * * It has applied that rule to taxing acts affecting Indians as to all others." (*Oklahoma Tax Com. v. United States*, 319 U.S. at 606.)

3. The Principle of Implied Governmental Immunity Does Not Free The Appellants From the Taxes in Question.

In substance, the appellants and amici curiae in these causes argue for the application of the principle of implied governmental immunity. However, the fact that the taxes in question here may have indirect or remote effect on some United States government policy concerning Indian affairs, or on self-government reserved to the Indian tribes by treaty, does not control.

The instant cases present, we suggest, a familiar problem in a perhaps less familiar context, i.e., the problem of implied governmental tax immunity. The decisions of this court on the question of state taxing power as it affects federal activities, and the decisions on the question of federal taxing power as

affects state activities, provide clear guidelines for resolving the problem of state taxing power as it affects Indian activities. We also suggest that the pattern of this court's decisions is to resolve questions in each of these three separate areas on a consistent basis, and that the clear trend of these decisions, in each of the three areas, is to narrow the scope of implied tax immunity, be that immunity invoked on behalf of the United States, a state, or an Indian. This narrowing has occurred primarily through a complete discarding of the former "economic burden" test. See generally *Graves v. New York*, *supra*, 306 U.S. 466, 83 L ed 927 (1939); *Helvering v. Mountain Producers Corp.*, *supra*, 303 U.S. 376, 82 L ed 907 (1938); *Oklahoma Tax Com. v. Texas Co.*, 336 U.S. 342, 93 L ed 721 (1949); *Alabama v. King & Boozer*, 314 U.S. 1, 86 L ed 3 (1941); *Curry v. United States*, 314 U.S. 14, 86 L ed 9 (1941); *James v. Dravo Contracting Co.*, 302 U.S. 134, 82 L ed 155 (1937); *Penn Dairies, Inc. v. Milk Control Com. of Pennsylvania*, 318 U.S. 261, 87 L ed 748 (1943); *Esso Standard Oil Co. v. Evans*, 345 U.S. 495, 97 L ed 1174 (1953); *United States v. City of Detroit*, *supra*, 355 U.S. 466, 2 L ed 2d 424 (1958).

Of these cases, *Oklahoma Tax Com. v. Texas Co.*, *supra*, *Helvering v. Mountain Producers Corp.*, *supra* and *Oklahoma Tax Com. v. United States*, *supra* are of special importance.

In *Oklahoma Tax Com. v. Texas Co.*, *supra*, this court had before it the question of:

> whether a lessee of mineral rights in allotted and restricted Indian lands is immu-

nized by the Constitution against payment of nondiscriminatory state gross production taxes and state excise taxes on petroleum produced from such lands. * * *" (336 U.S. at 349)

In answering this question, the court noted:

"* * *[I]t has long been established that property owned by a private person and used by him in performing services for the Federal Government is subject to state and local ad valorem taxes. * * *" (336 U.S. at 350)

"Moreover, even if the status of respondents as federal instrumentalities, in the sense in which they use the term, were fully conceded, it seems difficult to imagine how any substantial interference with performing their functions as such in developing the leaseholds could be thought to flow from requiring them to pay the small tax Oklahoma exacts to satisfy their shares of the state's expense in maintaining and administering its proration program. * * *" (336 U.S. at 351)

The Court then noted the uniform pattern which had developed both in the area of state taxation and in the area of federal taxation:

"* * * this Court's more recent pronouncements have beaten a fairly large retreat from its formerly prevailing ideas concerning the breadth of so-called intergovernmental immunities from taxation, a retreat which has run in both directions—to restrict the scope of immunity of private persons seeking to clothe themselves with governmental character from both federal and state taxation. The history of the immunity, by and large in both aspects, represents a rising or expanding curve, tapering off into a falling or contracting one." (336 U.S. 352)

This court then analyzed in detail the history of some of the immunity cases as pertained to Indians. It attributed particular importance to *Helver-*

Helvering v. Mountain Producers Corp., supra, 303 U.S. 376, 82 L ed 907 (1938), a case involving federal taxing power over an alleged state instrumentality.

In *Helvering* the court found that a lessee under an oil and gas lease of state school lands is not entitled to immunity, as a state instrumentality, from federal taxation in respect of income derived from operations under the lease. This same rule was applied in *Oklahoma Tax Com. v. Texas Co., supra*, to the state taxes there involved. The *Helvering v. Mountain Producers Corp.* test, quoted in *Oklahoma Tax Com. v. Texas Co., supra*, is that:

> "* * * immunity from non-discriminatory taxation sought by a private person for his property or gains because he is engaged in operations under a government contract or lease cannot be supported by merely theoretical conceptions of interference with the functions of government. Regard must be had to substance and direct effects. * * *" (303 U.S. at 386)

In *Helvering*, the court further refined the test by stating:

> "* * * And where it merely appears that one operating under a government contract or lease is subjected to a tax with respect to his profits on the same basis as others who are engaged in similar businesses, there is no sufficient ground for holding that the effect upon the Government is other than indirect and remote. * * *" (303 U.S. at 386-387)

In *Oklahoma Tax Com. v. United States, supra*, 319 U.S. 598, 87 L ed 1612 (1943), in upholding an Oklahoma estate tax, the court again affirmed *Helvering v. Mountain Producers Corp., supra*, and held that:

"* * * The immunity formerly said to rest on constitutional implication cannot now be resurrected in the form of statutory implication." (319 U.S. at 604)

"* * * A federal court has held, in a well reasoned decision defended before us by the Solicitor General of the United States, who is not a party to this action, that an Indian's estate is subject to the federal estate tax. Landman v. Commissioner of Internal Revenue (CCA 10th) 123 F (2d) 787. Congress cannot have intended to impose federal income and inheritance taxes on the Indians and at the same time exempt them by implication from similar state taxes." (319 U.S. at 608)

"Recognizing that equality of privilege and and equality of obligation should be inseparable associates, we have recently swept away many of the means of tax favoritism. Graves v. New York, 306 US 466, 83 L ed 927, 59 S Ct 595, 120 ALR 1466, permitted States to impose income taxes upon government employees and Helvering v. Gerhardt, 304 US 405, 82 L ed 1427, 58 S ct 969, permitted the federal government to impose taxes on state employees. O'Malley v. Woodrough, 307 US 277, 83 L ed 1289, 59 S Ct 838, 122 ALR 1379, overruled a previous decision which held that judges should not pay taxes just as other citizens, and Helvering v. Mountain Producers Corp. 303 US 376, 82 L ed 907, 58 S Ct 623, supra, repudiated former decisions seriously limiting state and federal power to tax. See also Metcalf v. Mitchell, 269 US 514, 70 L ed 384, 46 S Ct 172, and James v. Dravo Contracting Co. 302 US 134, 82 L ed 155, 58 S Ct 208, 114 ALR 318. The trend of these cases should not now be reversed." (319 U.S. 610)

The holding of *Oklahoma Tax Com. v. United States, supra,* was reaffirmed in *West v. Oklahoma Tax Commission, supra,* 334 U.S. 717, 92 L ed 1675

(1943), and extended to property held in trust by the United States for the benefit of the decedent Indian and his heirs. The court there noted that its decision in *Oklahoma Tax Com. v. United States, supra*, foreclosed an application of *United States v. Rickert*, 188 U.S. 432, 47 L ed 532 (1903).

Thus, *Rickert* provides no basis for resurrecting discarded notions of implied immunity, and should be confined to its facts, *i.e.*, to a situation in which a property tax was imposed directly upon property owned by the United States for the use and benefit of an Indian.

The reference, in *Oklahoma Tax Com. v. United States, supra*, to the applicability of the federal estate tax to Indians highlights an important principle established by *Helvering v. Mountain Producers Corp., supra, Oklahoma Tax Com. v. Texas Co., supra*, and *Oklahoma Tax Com. v. United States, supra*. Absent a clearly expressed congressional intent to the contrary, Indian immunity from state taxation (or lack thereof) should parallel Indian immunity from federal taxation (or lack thereof) and each should be determined by the same test.

This principle is also established by decisions of this Court involving state and federal taxation of Indian income.

Choteau v. Burnet, supra, 283 U.S. 691, 75 L ed 1353 (1931); *Five Civilized Tribes v. Com'r of Int. Rev., supra*, 295 U.S. 418, 79 L ed 1517 (1935); *Leahy v. State Treasurer of Oklahoma, supra*, 297 U.S. 420, 80 L ed 771 (1936). *Choteau* upheld the

imposition of the federal income tax on income received by a member of an Indian tribe as his share of royalties from oil and gas leases of tribal land, which was payable to him without restriction. *Leahy* upheld the imposition of a state income tax upon a competent member of the Osage tribe on income from his share of restricted mineral resources of the tribe.

This court there noted:

> "The facts are substantially the same as those presented in Choteau v. Burnet, supra, which upheld a federal income tax on a like payment. The applicable statutes and decisions are discussed there. As Leahy was entitled to have the income paid to him and was free to use it as he saw fit, no reason appears why it should not be taxable also by the State." (297 U.S. at 421)

In *Five Civilized Tribes v. Com'r of Int. Rev., supra*, the court upheld the imposition of the federal income tax on income derived from investment of surplus income from restricted land which was exempt from taxation as long as the title remained in the original allottee. Upholding the tax, the court noted:

> "We find nothing in either [federal statutes concerning the exemption of the land] which expresses definite intent to exclude from taxation such income as that here involved. See Shaw v. Gibson-Zahniser Oil Corp. 276 U.S. 575, 581, 72 L ed. 709, 714, 48 S. Ct. 333.
>
> "Nor can we conclude that taxation of income from trust funds of an Indian ward is so inconsistent with that relationship that exemption is a necessary implication. Nontaxability and restriction upon alienation are distinct things. [Citation omitted.] The taxpayer here is a citizen of the United States, and *wardship with limited power over his property does not, without more, render him immune from the common burden.*
>
> "Shaw v. Gibson-Zahniser Oil Corp. 276 U.S. 575, 72 L ed. 709, 48 S. Ct. 333, supra, held that

restricted land purchased for a full-blood Creek —ward of the United States—with trust funds was not free from state taxation, and declared that such exemption could not be implied merely because of the restrictions upon the Indian's power to alienate." (295 U.S. at 421) (Emphasis added.)

The taxpayers in the instant cases are no more federal instrumentalities, and immune as such from state taxation, than were the taxpayers in *Oklahoma Tax Com. v. United States*, *supra*, and *Oklahoma Tax Com. v. Texas Co.*, *supra*. And just as their income producing activities are not immunized from the scope of federal taxation, neither should they be immunized from the scope of state taxation.

In *New York v. United States*, 326 U.S. 572, 90 L ed 326 (1946), this court refused to exempt the state of New York from a federal tax imposed upon sales of mineral waters when the state engaged in the business of selling mineral waters. The court then noted:

"It is enough for present purposes that the immunity of the State from federal taxation would, in this case, accomplish a withdrawal from the taxing power of the nation a subject of taxation of a nature which has been traditionally within that power from the beginning. Its exercise now, by a non-discriminatory tax, does not curtail the business of the state government more than it does the like business of the citizen. It gives merely an accustomed and reasonable scope to the federal taxing power. Such a withdrawal from a non-discriminatory federal tax, and one which does not bear on the State any differently than on the citizen, is itself an impairment of the taxing power of the national government, and the activity taxed is such that its taxation does not unduly impair the State's functions of government. The nature of the tax immunity requires that it be so construed as to allow to each government reasonable scope for

its taxing power, Metcalf v. Mitchell, 269 US 514, 524, 70 L ed 384, 392, 46 S Ct 172. . . ." (326 U.S. at 588-589)

Applying these principles to the instant cases, it is clear that none of the taxes in question so affect the Indians or the federal government that they must be stricken. They have only an indirect or remote effect on any governmental operations or policies. The *Tonasket* case revolves around the ability of an individual Indian to carry on the business of selling cigarettes free of the Washington cigarette tax. The *McClanahan* case involves the individual income tax liability of an individual Indian. In *Mescalero*, an Indian tribe claims to have the right to construct and operate a ski resort business of substantial magnitude without incurring any state liability whatsoever. It makes this claim even though the property and business in question are located off reservation property.

Indirectly, the appellants and their amici curiae are asking this court to do one of two things: either declare that Indians and their tribal organizations are instrumentalities of the federal government or that Indians and their tribal organizations, to the extent that they implement federal economic policy for the Indians, are so closely related to a federal instrumentality that immunity is to be implied. Neither of these requests is supportable by the case law defining the scope of governmental immunity of the Indians from either state or federal taxation. Furthermore, if the government's objective is to assimilate the Indians into society as competent

equal members of the business community—the stated objective—it is difficult to see how this can be accomplished without them sharing generally in the privileges and responsibilities of government, which includes their bearing their share of general business tax obligations.

Indeed, a striving for equality of tax burdens has been the source for this Court's narrowing of the scope of implied governmental immunity, including the federal instrumentality doctrine. As stated in *Oklahoma Tax Com. v. United States, supra*:

> "Recognizing that equality of privilege and equality of obligation should be inseparable associates, we have recently swept away many of the means of tax favoritism." 319 U S at 610.

Should the Congress wish to resurrect such favoritism and reverse the trend, it may do so by express enactment. But until it does, the trend of this Court in sweeping away tax favoritism should continue.

4. The Taxes Imposed in These Causes Do Not Conflict With the Indian Right of Self-Government.

In *Kake v. Egan, supra*, 369 U.S. 60, 7 L ed 2d 573 (1962), this court rightly noted that:

> "Decisions of this Court are few as to the power of the States when not granted Congressional authority to regulate matters affecting Indians. * * *" (369 U.S. 74)

As to these decisions, however, the court noted:

> "These decisions indicate that even on reservations state laws may be applied to Indians unless such application would interfere with reservation self-government or impair a right granted or reserved by federal law. * * *" (369 U.S. 75)

Does the right of reservation-self-government prohibit the state taxes involved in the instant cases? We suggest that it does not, and that these taxes are perfectly compatible with that right.

If that right be conceived of as including the right to impose a tax upon the same activities or income as the state attempts to tax, no conflict thereby arises. An exercise of the taxing power of even such a sovereign as the federal government in no way precludes state taxation of the same subjects. Concurrent exercise of taxing powers by different sovereigns is an inherent part of our governmental system.

But should that right be conceived of as including the right to be immune from any exercise of state taxing power over commercial enterprises of the tribe or its members? This problem is perhaps presented in its most acute form by the *Mescalero* case, in which either the tribe or a corporation owned by it is the taxpayer. We suggest that, even if the tribal enterprise were fully on the reservation—which it is not—its taxation by New Mexico would not be in conflict with the tribe's right of self-government.

Again, a case from the field of intergovernmental immunity provides the guideline.

The test applied by this court in *New York v. United States*, *supra*, preserves unrestricted the traditional sovereign powers of the state, while at the same time refusing to allow that sovereignty to be a basis for immunizing from taxation state enterprises of the same type as are conducted by private

[illegible] Certainly, the right of a tribe to self-government should no more be a shield against taxation than is the sovereignty of a state. Again, tax favoritisms may be established—both for a state or a tribal business enterprise—as a matter of congressional grace. But no such favoritisms should be implied from the concept of self-government or sovereignty, be it tribal or state.

5. *Squire v. Capoeman*, 351 U.S. 1, 100 L ed 883 (1956), Does Not Preclude Application Of The Taxes In The Instant Causes.

In this brief, we have placed great reliance upon *Oklahoma Tax Com. v. United States*, 139 U.S. 598, 87 L ed 1612 (1943), and *West v. Oklahoma Tax Com.*, 334 U.S. 717, 92 L ed 1676 (1948). By reason of a Court of Claims' decision (*Mason v. United States*, June 16, 1972, appended to the Brief of Amicus Estate of Rose Mason, filed in McClanahan) the question arises as to whether this reliance is misplaced. For the Court of Claims held that *Squire v. Capoeman*, *supra*, has overruled at least *West*, if not both cases.

Note first that *Squire v. Capoeman* starts with two basic principles which are central to our whole brief:

> "We agree with the Government that Indians are citizens and that in ordinary affairs of life, not governed by treaties or remedial legislation, they are subject to the payment of income taxes as are other citizens. We also agree that, to be valid, exemptions to tax laws should be clearly expressed. * * *" (351 U.S. at 6)

Thus, the tax exemption found in *Squire v. Capoe-*

man rested upon a specific congressional enactment, i.e., section 6 of the General Allotment Act, 25 USC 349. In applying this provision, this Court stated:

> "The literal language of the proviso evinces a congressional intent to subject an Indian allotment to all taxes only after a patent in fee is issued to the allottee. This, in turn, implies that, until such time as the patent is issued, the allotment shall be free from all taxes, both those in being and those which might in the future be enacted." (351 U.S. at 8)

And the court in *Squire v. Capoeman*, *supra*, went on to hold where timber on the allotment is converted to money through sale of that timber, the exemption applies to the proceeds of the sale, so as to preclude a federal capital gains tax.

This holding does indeed cast doubt on one of the grounds of *West*, i.e., it casts doubt on the proposition that a tax, such as inheritance tax (or a capital gains tax as in *Squire*) may be valid as applied to trust property even though its direct effect is to diminish the corpus of the trust.

However, we do not rely, in the instant cases, on this aspect of *West*. In none of the instant cases is the tax involved either imposed upon or measured by trust property or the proceeds from the conversion thereof into money.

In essence, *Squire* held that Congress did not intend to take away with one hand, through the capital gains tax, a tax exemption which it had granted with the other hand, through section 6 of the General Allotment Act. In the instant cases, in contrast, we can find no congressional enactment which grants any applicable tax exemption in the first place.

CONCLUSION

The above cited cases collectively stand for the proposition that general nondiscriminatory taxes imposed on individual Indian citizens as residents and citizens of the state and United States are applicable if not expressly forbidden by congressional enactment. No exemptions are implied. Here, the Indians have sought to engage in general business activities or employment within the state. There is no reason to place them on a different economic footing than any other resident citizen of their respective states as to these business activities. The question of whether or not they are "competent" or "incompetent" pertains solely to their relationship with their interests individually or collectively in land set aside for their benefit. It does not remove them as individuals from the general jurisdiction of a state for the imposition of general nondiscriminatory taxes which reach all residents and citizens alike.

It should be further noted that these tax cases upholding the state's power to impose the taxes here in question are in accord with this Court's basic principles recently announced in *Kake v. Egan*, *supra*, and *Williams v. Lee*, *supra*, that the states are free to tax where the state action does not interfere with reservation self-government. To tax the Indians in the instant cases does not any more interfere with their exercise of the right of self-government than does the state taxation of a judge's salary interfere with the right of the United States to govern itself. *Graves v. New York*, *supra*, 306 U.S. 466, 83 L ed 927 (1939).

The argument of the appellants and *amici curiae* for the appellants in these cases in effect isolates the Indians and the Indian communities from the rest of the United States. In substance, their argument is a return (1) to the sovereign-nation concept of *Worcester v. Georgia*, *supra*, which has been repudiated, and (2) to the assumption that the federal government has preempted all powers, duties and responsibilities not exercised by the Indians themselves. The history of adjudications by this court, the progression of the law on the subject of Indian affairs, and the general application of governmental immunity forcefully preclude any rule today of isolation of Indians. Further, the pattern of federal legislation in dealing with Indian questions has been to protect the Indian in his dependent status and at the same time to relieve him from that dependency by making him a responsible citizen of the state, community and nation in which he lives. This includes duties, responsibilities and privileges concerning the whole gamut of governmental affairs, including state taxation.

In closing, it should be observed that the states of Washington, New Mexico and Arizona and the Multistate Tax Commission are as much concerned about the plight of the Indian as is the United States. The businesses and the individual income here sought to be taxed would not be a reality were it not for the substantial commerce between Indians, on the one hand and non-Indian residents of the states of Washington, Arizona, and New Mexico on the other hand. It is not believed that this court will countenance, as

being in accord with its former decisions, a policy that undermines the Indians' state tax responsibility for the business activities they conduct and the income they earn within the respective jurisdictions of the states.

Respectfully submitted,

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